

HON. JOHN C. COUGHENOUR

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

BERNADEAN RITTMANN, FREDDIE
CARROLL, JULIA WEHMEYER, and RAEF
LAWSON individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., and AMAZON
LOGISTICS, INC.,

Defendants.

Case No. 2:16-cv-01554-JCC

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR NOTICE
TO BE ISSUED TO SIMILARLY
SITUATED EMPLOYEES PURSUANT
TO 29 U.S.C. § 216(b)**

**NOTE ON MOTION CALENDAR:
January 20, 2017**

ORAL ARGUMENT REQUESTED

OPPOSITION TO NOTICE MOTION
NO. 2:16-CV-01554-JCC

MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, N.J. 08540
+1.609.919.6600

TABLE OF CONTENTS

I	INTRODUCTION	1
II.	SUMMARY OF RELEVANT FACTS	1
A.	The Amazon Flex Program.....	1
B.	Amazon Flex Independent Contractor Terms of Service	3
III.	ARGUMENT	3
A.	The Analysis Required For FLSA Section 216(b) Certification Is Far More Extensive Than The “Rubber Stamp” Urged By Plaintiffs	3
B.	Plaintiffs Are Not “Similarly Situated” To Absent DPs	6
1.	The Applicable Economic Realities Test Focuses On A Workers’ Economic Dependence Upon The Entity For Which Workers Provide Services; That Analysis Presents Substantial Individualized Questions Not Suitable For Collective Action Treatment In The Present Circumstances	6
2.	Plaintiffs’ Vague Cookie-Cutter Declarations Reflect Circumstances Substantially Different From Those To Which Other DPs Attest	8
3.	Plaintiffs Are Not Similarly Situated To The Vast Majority Of Delivery Partners Who Must Arbitrate Their Claims	15
C.	Even If the Court Allows Notice, the Court Should Order the Parties to Meet and Confer Regarding the Contents and Means of Distributing the Notice.....	17
IV.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Adami v. Cardo Windows, Inc.</i> , 299 F.R.D. 68 (D.N.J. 2014).....	16
<i>Amendola v. Bristol-Myers Squibb Co.</i> , 558 F. Supp. 2d 459 (S.D.N.Y. 2008).....	5
<i>Andel v. Patterson-UTI Drilling Co., LLC</i> , 280 F.R.D. 287 (S.D. Tex. 2012).....	7
<i>Bamgbose v. Delta-T Group, Inc.</i> , 684 F. Supp. 2d 660 (E.D. Pa. 2010)	7
<i>Barnes v. Abandonment Consulting Servs., L.L.C.</i> , No. 4:12-CV-01399, 2013 WL 3884198 (S.D. Tex. July 26, 2013)	8
<i>Benson v. W. Coast Constr.</i> , No. C06-1630RSM, 2007 WL 445456 (W.D. Wash. Feb. 6, 2007).....	4
<i>Bernard v. Household Int’l, Inc.</i> , 231 F. Supp. 2d 433 (E.D. Va. 2002)	9
<i>Briggs v. United States</i> , 54 Fed. Cl. 205 (Fed. Cl. 2002)	15
<i>Christianson v. NewPark Drilling Fluids, LLC</i> , No. CIV.A. H-14-3235, 2015 WL 1268259 (S.D. Tex. Mar. 19, 2015)	7
<i>Colson v. Avnet, Inc.</i> , 687 F. Supp. 2d 914 (D. Ariz. 2010)	4, 5
<i>Daskam v. Allstate Corp.</i> , No. C11-0131RSL, 2012 WL 4420069 (W.D. Wash. Sept. 24, 2012).....	6
<i>Daughtery v. Encana Oil & Gas (USA), Inc.</i> , 838 F. Supp. 2d 1137 (D. Colo. 2011).....	16
<i>Davis III v. Westgate Planet Hollywood Las Vegas, LLC.</i> , No. 2:08-cv-00722-RCJ-PAL, 2009 WL 102735 (D. Nev. Jan. 12, 2009)	5

OPPOSITION TO NOTICE MOTION
NO. 2:16-CV-01554-JCC

1	<i>Delano v. Mastec, Inc.</i> ,	
2	8:10-cv-320-T-27MAP, 2011 WL 2173864 (M.D. Fla. June 2, 2011)	16
3	<i>Demauro v. Limo, Inc.</i> ,	
4	No. 8:10-cv-413-T-33AEP, 2011 WL 9191 (M.D. Fla. Jan. 3, 2011).....	7
5	<i>Douglas v. Xerox Bus. Servs. LLC</i> ,	
6	No. C12-1798-JCC, 2014 WL 3396112 (W.D. Wash. July 10, 2014)	4
7	<i>Epic Systems Corp. v. Lewis</i>	
8	(No. 16-285).....	15
9	<i>Ernst & Young LLP v. Morris</i>	
10	(No. 16-300).....	15
11	<i>Fischer v. Kmart Corp.</i> ,	
12	Case No. 13-4116, 2014 WL 3817368 (D. N.J. August 4, 2014)	16
13	<i>Hanley v. Hand N'Heart, LLC</i> ,	
14	No. 06-71, 2007 WL 201088 (E.D. Va. Jan. 22, 2007)	9
15	<i>Hoffman-LaRoche, Inc. v. Sperling</i> ,	
16	493 U.S. 165 (1989).....	4, 15
17	<i>Holmes v. Quest Diagnostics, Inc.</i> ,	
18	No. 9:11-cv-80567, Dkt. #102 at p. 7 (S.D. Fla. June 14, 2012)	4
19	<i>Hughes v. Twp. of Franklin</i> ,	
20	No. 13-3761, 2014 WL 1428609 (D.N.J. Apr. 14, 2014).....	18
21	<i>Litty v. Merrill Lynch & Co.</i> ,	
22	No. CV 14-0425 PA.....	5
23	<i>Moba v. Total Transp. Servs. Inc.</i> ,	
24	16 F. Supp. 3d 1257, 1263–64 (W.D. Wash. 2014).....	6
25	<i>Morales v. Amazon.com LLC, et al</i> ,	
26	Case No. 3:16-cv-06462-THE (N.D. Cal.)	2, 4
	<i>Morangelli v. Chemed Corp.</i> ,	
	No. 10 Civ. 0876 (BMC), 2010 U.S. Dist. LEXIS 146149 (E.D.N.Y. Jun. 15,	
	2010)	16

1	<i>Morden v. T-Mobile USA, Inc.</i> ,	
2	No. 05-2112, 2006 WL 2620320 (W.D. Wash. Sept. 12, 2006).....	18
3	<i>NLRB v. Murphy Oil USA, Inc.</i>	
4	(No. 16-307).....	15
5	<i>Parker v. Rowland Express, Inc.</i> ,	
6	492 F. Supp. 2d 1159 (D. Minn. 2007).....	9
7	<i>Pennington v. Integrity Communs., LLC</i> ,	
8	No. 1:12-cv-5, 2013 WL 357516 (E.D. Mo. Jan. 29, 2013).....	9
9	<i>Pfaahler v. Consultants for Architects, Inc.</i> ,	
10	No. 99 C 6700, 2000 WL 198888 (N.D. Ill. Feb. 8, 2000).....	7
11	<i>Rudd v. T.L. Cannon Corp.</i> ,	
12	2011 WL 831446 (S.D.N.Y. Jan. 4, 2011)	6
13	<i>Schiller v. Rite of Passage, Inc.</i> ,	
14	Case No. 2:13-cv-0576-HR, 2014 WL 644565 (D. Ariz. Feb. 19, 2014).....	18
15	<i>Slavinski v. Columbia Ass’n</i> ,	
16	No. CCB-08-890, 2011 WL 2119231 (D. Md. May 27, 2011).....	9
17	<i>Stelmachers v. Maxim Healthcare Servs., Inc.</i> ,	
18	No. 1:13-cv-01062 (N.D. Ga.), Dkt. #45	18
19	<i>Thornton v. Mainline Commc’ns, LLC</i> ,	
20	No. 4:12CV479	8
21	<i>West v. Border Foods, Inc.</i> ,	
22	No. 05-2525, 2006 WL 1892527 (D. Minn. July 10, 2006)	15
23	<i>Woods, et al. v. Vector Mktng. Corp.</i> ,	
24	No. C-14-0264 EMC, 2015 WL 1195893 (N.D. Cal. Mar. 16, 2015).....	16
25	<i>Wynn v. Nat’l Broad. Co.</i> ,	
26	234 F. Supp. 2d 1067 (C.D. Cal. 2002)	5

STATUTES

9 U.S.C. § 4.....	17
9 U.S.C. § 9.....	17

OPPOSITION TO NOTICE MOTION
NO. 2:16-CV-01554-JCC

29 U.S.C. § 251(a)(1), (4), (7)4

FLSA.....3, 4, 5, 6, 10, 15, 18

I. INTRODUCTION

In their race to file their Notice Motion (Dkt. #20), Plaintiffs chose to rely on one-sided allegations (and a few scant and conclusory declarations). In so doing, Plaintiffs provide **no** evidence pertaining to Delivery Partners (DPs) operating out of the vast majority of the **87** Amazon Flex facilities around the country. A more balanced and fulsome record demonstrates Plaintiffs are not similarly situated to the tens of thousands of DPs they seek to represent.

While Defendants have had no opportunity to depose Plaintiffs or their few declarants, Defendants submit declarations from DPs who have delivered from nine stations, including some of the facilities serviced by Plaintiffs and their declarants.¹ Each of these DPs attests to circumstances extremely dissimilar from those recounted in Plaintiffs' threadbare declarations. While Plaintiffs paint a picture of constraints and control, their peers evidence all the hallmarks of independent contractor status. In any event, they could not differ more.

Plaintiffs' Motion presumes this Court is a rubber stamp. But certification and notice is no *fait accompli*. There now is a record to scrutinize carefully. Even under the standards for conditional "notice" certification, Plaintiffs have failed to prove that they are – or that anyone could be – similarly-situated enough to represent the far-flung, nationwide class of tens of thousands of DPs they seek to represent. The Court should deny notice.

II. SUMMARY OF RELEVANT FACTS

A. The Amazon Flex Program

Amazon offers various products through Amazon websites and mobile applications. Dkt. #37 at p. 2, ¶ 3. Large third-party delivery providers (*e.g.*, UPS) historically have delivered

¹ References to Defendants' Declarations in support of its Opposition are cited herein as "[Last Name] Decl. ¶ ____."

1 products for Amazon. *Id.* at ¶ 4. Amazon recently has supplemented those vendors with smaller
 2 delivery service providers (“DSPs”) (*e.g.*, Peach, Inc., a co-defendant in *Morales v. Amazon.com*
 3 *LLC, et al*, Case No. 3:16-cv-06462-THE (N.D. Cal.) (“*Morales*”), which is the first-filed action
 4 addressed in Amazon’s pending Motion to Dismiss, Dkt. #36 at pp. 10-11, 14-15, and, now, DPs
 5 crowdsourced through a smartphone-application-based program known as Amazon Flex. *Id.*
 6 DPs servicing Amazon Flex use personal vehicles or bicycles (or public transportation) to make
 7 deliveries. *Id.* at p. 9, ¶ 21. DPs decide when to provide services, subject to delivery volume. *Id.*
 8 at ¶ 22. DPs can accept or reject any opportunity offered by Amazon. Lumba Decl. 1/13/17 ¶ 5.
 9 DPs can and do service other gig economy businesses. Dkt. #37 at p. 9 ¶ 23.²

11 Amazon Flex opened on a “pilot” basis on July 6, 2015 and on a regular basis on
 12 September 29, 2015. Dkt. #37, p. 10 at ¶ 28. As of January 2017, Amazon Flex operates from 87
 13 Amazon locations in 36 cities in 24 states. Lumba Decl. 1/13/17 ¶ 4. Amazon Flex DPs work
 14 with one of two business segments of Amazon: Amazon Logistics (“AMZL” or “Logistics”) or
 15 Prime Now. Through AMZL, Amazon Flex DPs deliver orders contained in Amazon brown
 16 boxes or envelopes picked up from AMZL delivery stations. *Id.* at ¶ 7. Through Prime Now,
 17 DPs deliver traditional Amazon.com household items in paper bags, can deliver restaurant
 18 orders, third-party grocery or other merchandise orders, and orders from Amazon Fresh,
 19 depending on location. *Id.* at ¶ 8. A customer can opt to have a Prime Now order delivered
 20 within as little as one hour from the time an order is placed. *Id.* DPs currently are responsible

23 ² See, *e.g.*, Tiemann Decl. ¶ 12 (drives for Lyft); Craft Decl. ¶ 9 (Uber); Prevette Decl. ¶ 2 (UberEats and Favor);
 24 Huynh Decl., Dkt. #43 at p. 2, ¶ 4 (Uber, Lyft, and Doordash); Dkt. #36 at p. 11 n.2 (Plaintiff Lawson has driven for
 25 and filed claims against Uber, GrubHub, Jolt Delivery, and Postmates).

1 for only a subset of “last-mile” deliveries – *i.e.*, the last leg of a delivery to the customer. The
 2 rest remains with other third-party delivery providers (*e.g.*, UPS) with which Amazon has
 3 traditionally contracted and other DSPs. *Id.* at ¶ 9.

4 **B. Amazon Flex Independent Contractor Terms of Service**

5 The vast majority of DPs to whom Plaintiffs seek to send notice cannot join this case
 6 because they accepted individual arbitration agreements. Dkt. #36 at pp. 11-14, 19-30.
 7 Specifically, all DPs have agreed to the Amazon Flex Independent Contractor Terms of Service
 8 (“TOS”), which contain an arbitration provision. *Id.* at pp. 3-6. As explained in Defendants’
 9 Motions to Dismiss and for Relief from Deadlines (Dkt. #s 36, 39, & 42), all of the many
 10 thousands of DPs who currently participate (and many who no longer participate) in the Amazon
 11 Flex Program could have opted-out of the arbitration provision. Only 164 DPs did so, however,
 12 as of January 2017. Lumba Decl. 1/13/17 ¶15. The right to opt out is clear and easily exercised,
 13 as evidenced by the fact that Plaintiffs Rittmann, Carroll, and Wehmeyer opted-out and are free
 14 to pursue their claims in court (as can the other 161 DPs who opted out of arbitration). Plaintiff
 15 Lawson and the thousands of other DPs who accepted arbitration agreements cannot proceed in
 16 this court.
 17
 18

19 **III. ARGUMENT**

20 **A. The Analysis Required For FLSA Section 216(b) Certification Is Far More** 21 **Extensive Than The “Rubber Stamp” Urged By Plaintiffs.**

22 Almost 70 years ago, in the wake of a Supreme Court misinterpretation of legislative
 23 intent behind the FLSA and an ensuing opportunistic explosion of FLSA litigation (not unlike
 24 what the federal courts face today), Congress, under the title of “Representative Actions
 25

Banned,” amended 29 U.S.C. § 216(b). That amendment limited FLSA actions to individuals who affirmatively opt-in because, Congress declared, “[T]he courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged.” 29 U.S.C. § 251(a)(1), (4), (7); *see also Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (recounting legislative history). Adherence to these concerns requires careful scrutiny before authorizing Plaintiffs’ counsel to use this Court’s imprimatur to solicit claims, especially before this Court even has determined that they have stated a cognizable claim or if this is the appropriate Court to hear this action – as opposed to the *Morales* court in California. *See, e.g., Holmes v. Quest Diagnostics, Inc.*, No. 9:11-cv-80567, Dkt. #102 at p. 7 (S.D. Fla. June 14, 2012) (noting that “**if the Plaintiffs could obtain conditional certification (and increase the likelihood of extracting a settlement) against a national company merely by submitting a handful of boilerplate declarations, that would ‘present a ready opportunity for abuse.’**”) (emphasis added) (attached as Exh. A to Walsh Declaration 1/13/17). Cognizant of legislative history, the *Sperling* Court admonished that “courts must be scrupulous to respect judicial neutrality.” 493 U.S. at 174.

Plaintiffs must prove that they are “similarly situated” to those to whom they seek to send notice. 29 U.S.C. § 216(b);³ *Douglas v. Xerox Bus. Servs. LLC*, No. C12-1798-JCC, 2014 WL 3396112, at *2 (W.D. Wash. July 10, 2014) (citations omitted). This is no mere formality. *See*,

³ Section 216(b) does not define “similarly situated,” and neither the Supreme Court nor the Ninth Circuit has construed the term. *Benson v. W. Coast Constr.*, No. C06-1630RSM, 2007 WL 445456, at *1-2 (W.D. Wash. Feb. 6, 2007) (acknowledging that the Ninth Circuit has not defined “similarly situated,” and denying conditional certification where plaintiff “produced only a self-serving declaration, rife with hearsay, in an attempt to demonstrate that other employees also worked overtime for which they were not paid properly.”).

1 *e.g., Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 929-30 (D. Ariz. 2010) (“Although the burden
 2 . . . is light, there are limits, and the district court cannot function as a rubber stamp for any and
 3 all claims that come its way under this statute.”); *Litty v. Merrill Lynch & Co.*, No. CV 14-0425
 4 PA PJWX, 2014 WL 5904907, at *8 (C.D. Cal. Aug. 4, 2014) (“At this first stage, conditional
 5 certification is by no means automatic ...”). Notice is not warranted “[w]here a plaintiff fails to
 6 carry this burden or where a defendant employer shows either that the potential recipients of the
 7 notice are not similarly situated to the plaintiff or that it will likely succeed at trial.” *Amendola v.*
 8 *Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 467 (S.D.N.Y. 2008).

10 Plaintiffs must provide “**detailed** allegations supported by [affidavits] . . . [and] those
 11 affidavits must constitute admissible evidence” demonstrating that Plaintiffs are similarly
 12 situated to the tens of thousands to whom they seek to send notice. *See, e.g., Colson*, 687 F.
 13 Supp. 2d at 928 (emphasis added); *Litty*, 2014 WL 5904907, at *10 (denying certification and
 14 stating: “Several courts have found that merely alleging that a class of employees was wrongly
 15 designated “exempt” does not constitute a showing of an unlawful, institution-wide policy.”). In
 16 addition, Plaintiffs’ “affidavits [must] successfully engage defendants’ affidavits to the
 17 contrary.” *Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002). Courts then
 18 examine whether the quantity and quality of evidence establishes “a reasonable basis for [a]
 19 claim of classwide FLSA violations.” *Colson*, 687 F. Supp. 2d at 927-28. Plaintiffs fail to
 20 provide the requisite “detail” to justify notice.
 21
 22

23 The Court also should exercise great caution in deciding whether to attempt to manage
 24 the cases of DPs strewn across states. *See, e.g., Davis III v. Westgate Planet Hollywood Las*
 25

1 *Vegas, LLC.*, No. 2:08-cv-00722-RCJ-PAL, 2009 WL 102735 (D. Nev. Jan. 12, 2009) (rejecting
 2 plaintiffs’ argument that because Nevada, Florida, and Tennessee account for approximately
 3 69% of the sales force, individuals in other locations were subject to the same policy or practice,
 4 and thus denying notice nationwide); *Rudd v. T.L. Cannon Corp.*, 2011 WL 831446, at *6
 5 (S.D.N.Y. Jan. 4, 2011) (courts must be “mindful of the potential burdens associated with
 6 defending an FLSA claim involving a large and broadly defined collective group of plaintiffs”
 7 and avoid “the potential for overreaching [which] would result in loss of the efficiencies”)
 8 (internal citations and quotations omitted).

10 **B. Plaintiffs Are Not “Similarly Situated” To Absent DPs.**

11 *1. The Applicable Economic Realities Test Focuses On A Workers’*
 12 *Economic Dependence Upon The Entity For Which Workers Provide*
 13 *Services; That Analysis Presents Substantial Individualized Questions Not*
 14 *Suitable For Collective Action Treatment In The Present Circumstances.*

15 To prove employment status, each DP must prove economic dependence on Amazon.
 16 *Moba v. Total Transp. Servs. Inc.*, 16 F. Supp. 3d 1257, 1263–64 (W.D. Wash. 2014). This
 17 multi-factored inquiry considers, *inter alia*: 1) the degree of control over the manner in which the
 18 work is performed; 2) the alleged employee’s opportunity for profit or loss; 3) the alleged
 19 employee’s investment in equipment or materials required for his task, or his employment of
 20 helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of
 21 the working relationship; and 6) whether the service rendered is an integral part of the alleged
 22 employer’s business. *Id.* The existence and degree of each element of the economic realities test
 23 are issues of fact. *Daskam v. Allstate Corp.*, No. C11-0131RSL, 2012 WL 4420069, at *2 (W.D.
 24
 25

1 Wash. Sept. 24, 2012). Whether one is an employee under the FLSA depends on all the
 2 circumstances. *Moba*, 16 F. Supp. 3d at 1263–64.

3 Yet, Plaintiffs argue that courts “have routinely granted notice to workers who fall under
 4 the same job category and have been uniformly classified as independent contractors.” Dkt. #20
 5 at pp. 4-5. In the context of the fact-specific economic realities analysis, one can always find
 6 cases that superficially support their arguments. That hardly renders certification “routine.” In
 7 fact, many cases more closely aligned with the circumstances here have rejected certification of
 8 independent contractor issues. *See, e.g., Pfaahler v. Consultants for Architects, Inc.*, No. 99 C
 9 6700, 2000 WL 198888, at *2 (N.D. Ill. Feb. 8, 2000) (no certification; “individual
 10 determination as to the nature of each potential claimant’s employment relationship with
 11 [defendant]” was required); *Demauro v. Limo, Inc.*, No. 8:10-cv-413-T-33AEP, 2011 WL 9191,
 12 at *3 (M.D. Fla. Jan. 3, 2011) (no certification; holding “whether an individual is an independent
 13 contractor or an employee is not appropriate for determination on a class-wide basis”);
 14 *Bamgbose v. Delta-T Group, Inc.*, 684 F. Supp. 2d 660, 668-69 (E.D. Pa. 2010) (“[t]he Court
 15 cannot only look to [the defendant’s] uniform classification of the workers. . . . Instead, it must
 16 determine whether the proof to demonstrate that the workers are ‘employees’ or ‘independent
 17 contractors’ can be applied to the class as a whole”); *Andel v. Patterson-UTI Drilling Co., LLC*,
 18 280 F.R.D. 287, 290 (S.D. Tex. 2012) (no certification, emphasizing that “even among the four
 19 named Plaintiffs, the number of days and hours worked, “pattern of days on and off” and “length
 20 of time each Plaintiff worked for Defendant,” and “each Plaintiff’s relative investments and
 21 ability to control his opportunities for profit and loss . . . varied significantly.”); *Christianson v.*
 22
 23
 24
 25

1 *NewPark Drilling Fluids, LLC*, No. CIV.A. H-14-3235, 2015 WL 1268259, at *3-5 (S.D. Tex.
 2 Mar. 19, 2015) (no certification as question of contractor status required individualized analysis,
 3 finding evidence on economic reality factors varying significantly among putative class members
 4 as to the degree of control, amount, extent, and schedule of work performed, exercise of ability
 5 to work for other companies, use of own equipment, and degree of skill acquired),
 6 *reconsideration denied*, No. CIV.A. H-14-3235, 2015 WL 1505834 (S.D. Tex. Apr. 1, 2015);
 7 *Barnes v. Abandonment Consulting Servs., L.L.C.*, No. 4:12-CV-01399, 2013 WL 3884198, at *5
 8 (S.D. Tex. July 26, 2013) (no certification where plaintiff provided scant evidence about whether
 9 he and others to whom he sought to send notice were independent contractors), *report and*
 10 *recommendation adopted sub nom. Barnes v. Abandonment Consulting Servs., LLC*, No. 12-CV-
 11 1399, 2013 WL 12101069 (S.D. Tex. Aug. 12, 2013); *Thornton v. Mainline Commc'ns, LLC*,
 12 No. 4:12CV479 SNLJ, 2015 WL 3938652, at *2 (E.D. Mo. June 26, 2015) (no certification
 13 where Plaintiffs' affidavits "only generally allege[d] that they witnessed other technicians being
 14 subject to the same Mainline policies and control and being classified as independent
 15 contractors" "is insufficient to show that other technicians worked in excess of forty hours per
 16 week and were not paid overtime.").

19 2. *Plaintiffs' Vague Cookie-Cutter Declarations Reflect Circumstances*
 20 *Substantially Different From Those To Which Other DPs Attest.*

21 Plaintiffs' template, conclusory declarations are nearly identical except for their signature
 22 blocks. They each state how they make deliveries, and express— with reference to no facts — that
 23 they "believe" they have been paid below the minimum wage. *See, e.g.*, Dkt. #20-2 (Wehmeyer
 24 Decl.) at pp. 3-4 ¶¶ 6, 10; Dkt. #20-3 (Rittmann Decl.) at pp. 3-4, ¶¶ 6, 10; Dkt. #20-4 (Carroll
 25 Decl.) at pp. 3-4 ¶¶ 6, 10.

Decl.) at pp. 3-4 ¶¶ 6, 10; Dkt. #20-5 (Pearce Decl.) at pp. 3-4, ¶¶ 6, 10; Dkt. #20-6 at p. 3, ¶ 6.

Of course, anyone who makes deliveries for Amazon will be superficially similar in the sense that they deliver packages to Amazon customers. UPS drivers meet that standard – and Plaintiffs do not claim such drivers are similarly-situated with DPs. In short, Plaintiffs have “checked the box” for submitting declarations, but shed little light on the issues in this case. Plaintiffs are required to, but have not, demonstrated common issues related to *independent contractor classification* sufficient to grant Plaintiffs’ Motion. *See, e.g., Pennington v. Integrity Communs., LLC*, No. 1:12-cv-5, 2013 WL 357516, at *2 (E.D. Mo. Jan. 29, 2013) (no certification in the independent contractor context for lack of sufficient evidence); *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159, 1165 (D. Minn. 2007) (no certification where “[t]he only evidence Plaintiffs have proffered about the opt-in class is contained in their Affidavits, in which they state that they are ‘informed and believe. . . many other independent contractor driver/couriers worked in excess of forty (40) hours per week and did not receive overtime compensation’.”)

Moreover, Plaintiffs cannot claim personal knowledge of the work of other DPs, especially at facilities with which they have no contact. Indeed, as reflected in DP declarations submitted by Defendants (*see infra* at pp. 10-14), Plaintiffs do not come close to speaking on behalf of the nationwide putative class they seek to represent. *Slavinski v. Columbia Ass’n*, No. CCB-08-890, 2011 WL 2119231, at *2 (D. Md. May 27, 2011) (class allegations of misclassification are “not sufficient to make a preliminary factual showing that a similarly situated group of potential plaintiffs exists”). Plaintiffs have failed to prove they are “similarly situated” to the diverse population of thousands of DPs they seek to represent. *See, e.g., Hanley*

1 *v. Hand N'Heart, LLC*, No. 06-71, 2007 WL 201088, *13-14 (E.D. Va. Jan. 22, 2007)
 2 (certification denied, rejecting affidavits containing conclusory allegations); *Bernard v.*
 3 *Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) (“The information provided by
 4 plaintiffs, both in the pleadings and in supporting declarations and exhibits, is insufficient to
 5 support allegations that defendant has a company-wide policy resulting in potential FLSA
 6 violations.”).

8 Against this legal backdrop, the evidence here proves that there is far too much variation
 9 for FLSA Section 216(b) certification or notice to be granted. Set forth below is a summary of
 10 some of those variations:

11 1. As explained *supra* at Section II.A, Amazon Flex DPs contract to deliver for one
 12 of two differing business segments of Amazon: AMZL or Prime Now. DPs delivering with
 13 AMZL pick up parcels from an AMZL delivery station. Some DPs, on the other hand, may not
 14 even set foot in an Amazon facility if they service Prime Now and pick up items from local
 15 restaurants, grocery stores, or other third party sellers for deliveries to customers.⁴

17 2. Although Plaintiffs contend that they worked either two- or four-hour routes (Dkt.
 18 #20 at p. 2), delivery blocks may run as short as one hour for Prime Now deliveries and may
 19 exceed four hours for AMZL depending upon the number and location of the deliveries. Lumba
 20 Decl. 1/13/17 ¶ 12.⁵

23 ⁴ See Meade Decl. ¶ 8; see also Dkt. #20-7 (Kogan Decl.) at p. 3, ¶ 6.

24 ⁵ See also, e.g., Prevette Decl., ¶ 5 (differentiating between Prime Now and AMZL blocks); Johnson Decl. ¶ 8
 25 (noting delivery blocks taken between one and three hours).

3. While named Plaintiffs contend Amazon controlled their work (Dkt. #20 at pp. 3, 8), other DPs attest that they completely control how many and which blocks they accept.⁶

4. Also, the frequency and duration during which DPs drive for Amazon Flex varies widely. For example, for the period from approximately February 4, 2016 through November 2, 2016, Plaintiff Carroll delivered packages on approximately 111 days, Plaintiff Rittmann on 67 days, Declarant Gilliard on 24 days, and Declarant Huynh on 233 days. Lumba Decl. 1/ 13/17 ¶ 13. Plaintiff Lawson did not even start delivering until November 21, 2016. *Id.* at ¶ 14. Only Plaintiff Carroll even alleges that he provided delivery services for over 40 hours in a week. Dkt. #20-4 at p. 4, ¶ 11. Indeed, Opt-In Pearce contends she delivered for “forty hours *or less.*” Dkt. #20-5 at p. 4, ¶ 11 (emphasis added).

Much variation is due to DPs choosing the blocks they wish to deliver. As an example, Declarant Pablo Ovando has a farming business and prefers to drive at night after “family time and other life obligations” (Ovando Decl. ¶¶ 6, 8), while Declarant Phi Huynh wakes up at 6:30 a.m. to “look for available blocks to pick up” and “will try to pick up blocks throughout the day.” Huynh Decl., Dkt. #43 at p. 3, ¶ 13.⁷ In short, while Plaintiffs may self-servingly attest to their perceptions that Amazon assigned shifts, Dkt. #20 at p. 2, other DPs do not share that experience.

⁶ See, e.g., Ovando Decl. ¶¶ 5, 6; Huynh Decl., Dkt. #43 ¶ 13; Holstein Decl. ¶¶ 6, 10, 13, 16, 20; Gilliard Decl. ¶¶ 6, 10; Craft Decl. ¶ 10-12.

⁷ See also Meade Decl. ¶¶ 5-6 (fits Amazon Flex deliveries around full-time job and family obligations); Holstein Decl. ¶¶ 17, 20 (describing change from delivering 30-35 hours in one period to 20 hours, and stopping all delivery operations for six weeks starting in Nov. 2016); Prevette Decl. ¶¶ 4-6 (describing differences between Prime Now and other Amazon deliveries, including sometimes completing two-hour blocks in only one hour); Tiemann Decl. ¶¶ 4-5 (schedules 4-5 blocks per week around dropping off and picking up child from school, and describing being paid for one block although there no deliveries were required).

5. Plaintiffs and their declarants all profess their “belief” that they may have worked weeks when they did not receive the federal minimum wage. *See, e.g.*, Dkt. #20-3 at p. 4, ¶ 10; Dkt. #20-4 at p. 4, ¶ 10; Dkt. #20-5 at p. 4, ¶ 10. Even if they so believe (a dubious or ill-informed proposition), their testimony is not representative. Amazon pays Service Fees per block which vary depending on circumstances, including geography and whether “surge” pricing is in effect because of weather or special events increasing demand. Lumba Decl. 1/13/17 ¶ 10. Amazon generally pays Service Fees per block that roughly equate to a rate of between \$18 and \$25 per hour, multiplied accordingly by anticipated duration of block (*e.g.*, a “two-hour” block would receive at least \$36). *Id.* at ¶ 11. As the federal minimum wage is \$7.25 per hour – or roughly \$10.75 per hour lower than the lowest Service Fee paid – even if Plaintiffs’ claims of having been paid sub-minimum wage were not fantastical, they hardly would be representative of tens of thousands of DPs who never fell below the minimum wage.

6. DPs’ experiences delivering with Amazon Flex vary widely as well. In stark contrast to an employment relationship, DPs choose when, where, and how they perform their services, which allows further opportunities to tailor their businesses to maximize profit and minimize loss. While named Plaintiffs suggest that they are subject to great control by Amazon (Dkt. #20 at p. 3), other DPs have profoundly different experiences. Indeed, other DPs attest that they rarely have interaction of note with anyone from Amazon⁸ and that Amazon does not

⁸ Ovando Decl. ¶ 8 (“If I have to communicate with Amazon from the road, I contact Amazon Support personnel at a centralized number. I don’t deal with Amazon personnel at the Chesapeake location.”); Craft Decl. ¶¶ 12-13 (explaining “interactions with Amazon employees at the warehouse are limited,” and describing first day delivering as “sink or swim”); Holstein Decl. ¶ 16 (“When making deliveries, I do not have any contact with the warehouse.”);

control how they make deliveries,⁹ and leaving DPs to maximize their profit by choosing to complete deliveries in the most efficient manner of their own choosing. DPs choose how to organize packages to optimize both space and efficiency in deliveries dependent on personal preferences.¹⁰ While Amazon offers suggestions, DPs are free to choose the route as they deem fit.¹¹ Declarant Ovando has traded routes with other DPs to take a route closer to home that was better for both DPs involved. Ovando Decl. ¶12; *see also* Johnson Decl. ¶ 9. In these many respects, DPs control how long they take to deliver packages, and can spend the remainder of the block – for which they are paid in full – however they choose. Alternatively, if they complete their deliveries early, they may be able to pick up additional blocks, thereby maximizing their revenue. In short, even if one were to accept Plaintiffs’ implausible claim that Amazon compels them to follow strict routes “assigned” by Amazon, the record fails to support the contention that any uniform policy or practice exists.

7. Plaintiffs portray a world in which they have no control over their work, are assigned routes and “shifts,” and have no control over their profits and losses. Other DPs, by contrast, attest to creating their own efficiencies, running their own businesses, and investing in

Meade Decl. ¶ 9 (explaining “I have very little interaction with Amazon employees at the site. I’m really not instructed or directed by Amazon employees.”); Huynh Decl., Dkt. #43, pp. 3-4, ¶ 13.

⁹ Ovando Decl. ¶¶ 6, 7 (“I control all of my decisions with Amazon Flex”); Meade Decl. ¶ 9 (“Once I’m out on the street and actively doing deliveries, everything is up to me.”); Huynh Decl., Dkt. #43, pp. 3-4, ¶ 13 (Amazon doesn’t tell him how or when to do deliveries); Prevette Decl. ¶ 10 (“I have never been called, emailed or texted by Amazon employees at the warehouse while on the road making deliveries.”);.

¹⁰ Ovando Decl. ¶ 10 (organizes by number of packages per stop); Tiemann Decl. ¶ 8 (organizes by neighborhood and addresses therein); Gilliard Decl. ¶ 8 (“I load my car in the way that makes sense to me, and I can deliver in whatever order I want.”); Meade Decl. ¶ 10 (organizes “based on what best meets my needs.”).

¹¹ *See, e.g.*, Ovando Decl. ¶11 (ignoring suggestions and taking route to have last stop closest to home rather than warehouse); Johnson Decl. ¶ 6; Huynh Decl., Dkt. #43, pp. 2-3, ¶ 15 (adjusting route to make last stop closest to home on some routes).

1 their own equipment and materials. DPs can choose larger vehicles that carry more parcels or
 2 vary the length of blocks. For example, Declarant Holstein has used an SUV and a pick-up
 3 truck, but prefers the former because of better gas mileage. Holstein Decl. ¶ 12; *see also* Craft
 4 Decl. ¶ 5) (delivers with a Kia Optima). Other DPs drive hybrid or other economical vehicles to
 5 save money on gas, thus increasing their profits. Huynh Decl., Dkt. #43, at p. 3, ¶ 14. In some
 6 regions, DPs may even use bicycles to deliver orders. *See* Dkt. #37 at p. 9, ¶ 21.

8 8. Yet another differentiator among DPs is the degree to which they apply their
 9 varying degrees of skill and experience to running a successful delivery business. For example,
 10 the most successful DPs master the logistics of packing their vehicle efficiently to maximize the
 11 speed with which they can retrieve parcels for delivery. Similarly, they establish for themselves
 12 what they believe to be the best route to complete deliveries as quickly and efficiently as
 13 possible. *See supra*, pp. 12-13, n. 9-11. Others invest in carts, bags, or other equipment to help
 14 expedite deliveries.¹² And, as Plaintiffs note, DPs invest in their own Android smartphone. Dkt.
 15 #20 at p. 2. Finally, DPs attest that they are running their own businesses.¹³ To the extent
 16 Plaintiffs do not have these experiences yet, they are not similarly-situated to those they seek to
 17 represent. No notice should issue.

19 ¹² *See, e.g.*, Huynh Decl., Dkt.#43, p. 5, ¶ 15 (uses a laundry bag and cart to deliver multiple packages at once);
 20 Craft Decl. ¶¶ 18-20 (uses a dolly and cell phone holder); Holstein Decl. ¶ 13 (foldable cart); Prevette Decl. ¶ 12
 (navigation application).

21 ¹³ *See*, Huynh Decl., Dkt. #43, pp. 3-4 ¶¶ 9, 14, 15; *id.* ¶ 14 (“I am my own business when I drive and deliver for
 22 Amazon Flex.”); Prevette Decl. ¶¶ 8-9, 11 (“I take a lot of pride in my work. I am always trying to find ways to
 23 complete my deliveries faster and better. I chart my own routes after picking up blocks, use a variety of mapping
 24 apps to improve my efficiency, and constantly looks ways to improve my business while making the customers
 happy,” including using her own insulated bags, which ensures a better customer experience and higher tips);
 Ovando Decl. ¶ 7 (“... I control my own business, and I make more money because I work for myself I also
 have the chance to interact with a lot of people from all walks of life. I have my own farming business, so it helps
 that I am able to interact with and meet new people through Amazon Flex to help that business as well.”)

3. *Plaintiffs Are Not Similarly Situated To The Vast Majority Of Delivery Partners Who Must Arbitrate Their Claims.*

Even if Plaintiffs could demonstrate that they are similarly-situated to all other DPs – and they cannot – the Court still must determine whether to authorize notice where the vast majority of DPs accepted arbitration agreements. The touchstone under Section 216(b) is efficiency. *See, e.g., Hoffman-La Roche*, 493 U.S. at 170.¹⁴ “Neither the remedial purposes of the FLSA, nor the interests of judicial economy, would be advanced if we were to overlook facts which generally suggest that a collective action is improper.” *West v. Border Foods, Inc.*, No. 05-2525, 2006 WL 1892527, at *7 (D. Minn. July 10, 2006). *See also Briggs v. United States*, 54 Fed. Cl. 205, 207 (Fed. Cl. 2002) (in FLSA overtime case, certification and notice were denied because of the “issuance of such notice when certification will not be granted would be a futile act”).

Plaintiffs’ argument that the “proper course” to first conditionally certify a class and issue notice only to litigate enforceability for each respective opt-in plaintiff later (*see* Dkt. #20 at p. 10, n.8) makes no sense under the circumstances of this case and would ultimately serve only to waste the Parties’ and the Court’s resources. First, the parties already have fully briefed the issue of enforceability of the arbitration provisions in this case. Second, as explained in more detail in Defendants’ briefing in support of their Motion for Relief from Deadlines (Dkt. #39 at p. 7; Dkt. #42 at pp. 5-7), a slight delay in disposition of this notice motion runs no risk that any absent class member’s statute of limitations will run. Third, there are no issues of procedural

¹⁴ Issuing notice is improper and premature for the reasons discussed in this Opposition, particularly in view of the fact that the United States Supreme Court today granted *certiorari*, and consolidated cases from three Courts of Appeals, on an issue presented here – namely, that an individual who agrees to arbitration cannot participate in a collective action under the FLSA. *See Epic Systems Corp. v. Lewis* (No. 16-285), *Ernst & Young LLP v. Morris* (No. 16-300), and *NLRB v. Murphy Oil USA, Inc.* (No. 16-307).

1 unconscionability that can be adjudicated only after an absent class member opts-in. Rather,
 2 Plaintiffs are attacking the arbitration provision here solely on substantive unconscionability
 3 grounds that can be decided before notice goes out.

4 Under similar circumstances, other courts have refused to grant notice to persons who
 5 have accepted arbitration agreements. *Morangelli v. Chemed Corp.*, No. 10 Civ. 0876 (BMC),
 6 2010 U.S. Dist. LEXIS 146149, at *13-14 (E.D.N.Y. Jun. 15, 2010) (“It would be a disservice to
 7 judicial efficiency to certify all [putative class members], when those with arbitration agreements
 8 are subject to additional, prolonging motion practice which will likely disqualify them from the
 9 case.”); *Fischer v. Kmart Corp.*, Case No. 13-4116, 2014 WL 3817368, at *6, 8 (D. N.J. August
 10 4, 2014) (“Opt-In Plaintiffs [who] consented to an arbitration agreement and a collective action
 11 waiver . . . are both prevented from joining this collective action. . . and are also not similarly
 12 situated to members who can arbitrate in a collective action.”); *Delano v. Mastec, Inc.*, 8:10-cv-
 13 320-T-27MAP, 2011 WL 2173864, at *6 (M.D. Fla. June 2, 2011) (no notice where only three
 14 potential opt-ins not subject to mandatory arbitration after months of discovery and potential opt-
 15 ins subject to arbitration not similarly situated to Plaintiffs).

16 Even if the Court allows notice to some DPs, those who are subject to arbitration should
 17 be excluded. *Woods, et al. v. Vector Mktng. Corp.*, No. C-14-0264 EMC, 2015 WL 1195893
 18 (N.D. Cal. Mar. 16, 2015) (individuals subject to arbitration excluded); *Adami v. Cardo*
 19 *Windows, Inc.*, 299 F.R.D. 68, 81, (D.N.J. 2014) (excluding individuals “who signed mandatory
 20 arbitration and/or class action waiver agreements from collective action definition” finding
 21 “Plaintiffs have not made a sufficient factual showing that helpers are similarly situated.”);
 22
 23
 24
 25

1 *Daughtery v. Encana Oil & Gas (USA), Inc.*, 838 F. Supp. 2d 1137, 1130, 1133 (D. Colo. 2011)
 2 (upon finding arbitration provisions in Independent Contractor Agreements enforceable, limited
 3 notice to individuals who did not sign agreements containing an arbitration provision).¹⁵

4 **C. Even If the Court Allows Notice, the Court Should Order the Parties to Meet**
 5 **and Confer Regarding the Contents and Means of Distributing the Notice.**

6 Notice should not issue. In the event the Court disagrees, however, Plaintiffs should be
 7 directed to confer with Amazon to develop an appropriate notice – something they have not
 8 done. Should the Court direct notice, and if the parties cannot reach agreement, Defendants
 9 request that the parties be permitted to make further submission to the Court to address whatever
 10 issues remain open for resolution following the parties’ efforts to meet and confer. Set forth
 11 below are certain objections Defendants have to Plaintiffs’ proposed notice. *See* Dkt. #20-1.

13 • No Appearance of Judicial Endorsement. The notice should contain a prominent
 14 statement on the first page that the Court takes no position on the merits of Plaintiffs’ claims, that
 15 sending of the notice does not that mean DPs have a right to overtime or minimum wage, and
 16 that one possible outcome is that the Court may decertify the action in the future.

18 • Creates Impression of Entitlement to Overtime/One-Sided View of Litigation.
 19 The notice should not give the impression that Plaintiffs are entitled to overtime, much less
 20 liquidated damages, which are the ultimate issues to be decided in this lawsuit. In addition, any

22 ¹⁵ Indeed, issuing notice to a party subject to an enforceable arbitration agreement raises important issues about the
 23 Court’s jurisdiction. The FAA carves out limited jurisdiction for a court under which “[a] party aggrieved by the
 24 alleged failure, neglect, or refusal . . . to arbitrate” may seek “an order directing that such arbitration proceed in the
 25 manner provided for in such [arbitration] agreement” in the “district court which, *save for such agreement, would*
 26 *have jurisdiction* under title 28 . . .” 9 U.S.C. § 4 (emphasis added); *see also* 9 U.S.C. § 9 (granting limited
 jurisdiction to confirm, vacate, modify, or correct an arbitration award).

notice should clearly state Amazon's position that DPs are properly classified as independent contractors and therefore are properly and legally not paid overtime.

- States that Amazon Agrees That Plaintiffs Who Did Not Opt-Out of Arbitration Can Sue in Court. This statement is directly contrary to Amazon's position. *See* Dkt #36.

- The Ninety-Day Proposed Notice Period is Unnecessarily Long. *See, e.g., Hughes v. Twp. of Franklin*, No. 13-3761, 2014 WL 1428609, at *4 (D.N.J. Apr. 14, 2014) (45 days). At maximum, any opt-in period in this action should not exceed sixty days. *See, e.g., Morden v. T-Mobile USA, Inc.*, No. 05-2112, 2006 WL 2620320, at *4 (W.D. Wash. Sept. 12, 2006).

- FLSA Notices Routinely Alert Potential Opt-ins That They May Have to Participate in Discovery and Testify.

- Notice Should Advise Regarding Potential for Fees and Costs. *See, e.g., Schiller v. Rite of Passage, Inc.*, Case No. 2:13-cv-0576-HR, 2014 WL 644565, at *6 (D. Ariz. Feb. 19, 2014) ("... the court agrees with defendant that potential class members should be made aware of the possibility of having to pay defendant's attorney's fees if plaintiffs do not prevail)."

- Plaintiffs Are Not Entitled to DPs' Phone Numbers and E-mail Addresses. *See, e.g., Stelmachers v. Maxim Healthcare Servs., Inc.*, No. 1:13-cv-01062 (N.D. Ga.), Dkt. #45 p. 10 (Aug. 5, 2013) (attached as Exh. B to Walsh Decl. 1/13/17).

IV. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion and decline to issue notice to the putative class.

1 Dated: January 13, 2017.

2 Respectfully Submitted,

3
4 By: /s/ Suzanne J. Thomas

5 Suzanne J. Thomas, WSBA #17338
6 K&L GATES LLP
7 925 Fourth Ave, Suite 2900
8 Seattle WA 98104-1158
9 Telephone: 206-370-6642
10 suzanne.thomas@klgates.com

11 Richard G. Rosenblatt (*Pro Hac Vice*)
12 James Walsh, Jr. (*Pro Hac Vice*)
13 MORGAN LEWIS & BOCKIUS
14 502 Carnegie Center
15 Princeton, NJ 08540
16 Telephone: 609-916-6600
17 rrosenblatt@morganlewis.com
18 james.walsh@morganlewis.com

19 Allison N. Powers (*Pro Hac Vice*)
20 Meredith Riccio (*Pro Hac Vice*)
21 MORGAN LEWIS & BOCKIUS
22 77 West Wacker Drive, 5th Floor
23 Chicago, IL 60601
24 Telephone: 312-324-1000
25 allison.powers@morganlewis.com
26 meredith.riccio@morganlewis.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) to the following on January 13, 2017:

Adelaide Pagano
Harold Lichten
Shannon Liss-Riordan
LICHTEN & LISS-RIORDAN, P.C.
729 Boyston Street, Suite 2000
Boston, MA 02116
Tel: 617-994-5800
apagano@llrlaw.com
hlichten@llrlaw.com
ss@llrlaw.com

Michael C Subit
FRANK FREED SUBIT & THOMAS LLP
705 2nd Ave, Suite 1200
Seattle, WA 98104-1729
Tel: 206-682-6711
msubit@frankfreed.com

/s/ Suzanne J. Thomas

DB1/ 90365839.4